IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 172.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY,

Appellants,

vs.

ALRA G. FARRELL, *Appellee.*

PETITION FOR REHEARING

S. M. STOCKSLAGER,
Of Counsel.

INDEX

STATEMENT AND REASONS FOR REHEARING.

A, B, C, D, E, F, G, H.

Consisting mainly of erroneous statements of the contents of the record, which statements controlled the decision.

QUESTIONS INVOLVED.

(a) Conflict between selection of Idaho under Act of August 18, 1894 (28 Stat., 394); Mt. Rainer grant to Northern Pacific Railroad Company (30 Stat., 994), and Delaney, a settler, under Act of 1880, on unsurveyed land.

(b) Being the first construction by this court of effect of filing and giving notice required by Act of 1894 empowering the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota, Wyoming, and Utah to file with the Commissioner of the General Land Office applications for survey by townships of land to fill their grants, reserving same upon filing application from any adverse appropriation—giving such State the "exclusive" right to select any or all of the land for a period of 60 days from filing plat in the local office, the land not selected to become a part of the public domain.

(c) Is this not a statutory reservation and beyond the jurisdiction of the Commissioner?

(d) Whether statutory or not, could the Railway Company by a subsequent selection under the Act which confines its right of selection to public lands "not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection," gain any right whatever by such subsequent selection, made prior to the expiration of the 60-day period allowed the State to select?

(e) If the State selected the land in due time when Delaney, the settler, who settled subsequent to the State's application and to the selection of the company, but who was living on the land at the date of the selection by the company in 1909, and also in 1915, when the State's selection was canceled, did he not have a right prior and superior to that of the Railway Company?

(f) If, as held by the Department and the District Court, the attempted selection by the Railway Company after the filing and notice by the State should be treated as a second or subsequent contest

(if there could be one there might be any number), it follows that, as in contests, when the first contest is successful, the entry canceled and the preference right of the contestant exercised, the subsequent contests based on this canceled entry *must fall*, and the legal effect is the same as if cancellation had taken place when ordered by the Department, although not formally rejected. (37 L. D., 193) Quoting St. Paul S. M. & M. Ry. Co. vs. Donohue, 210 U. S., 521, emphasized at page 505, 37 L. D.

(g) The timely selection by the State segregated the land and is equivalent to an entry. 32 L. D., 51, approved in Weyerhauser vs. Hoyt, 210 U. S., 380; Leet vs. N. P. Ry. Co., 37 L. D., 37.

(h) The statutory reservation created by the State's application and notice and its timely selection *approved* and remaining of record until canceled June 28, 1915, effectually prevented the attaching of any claim of the Railway Company under its subsequent selection in 1901, and when it was finally canceled, Delaney was, and for 12 years had been, a *bona fide* homestead settler on the land whose right immediately attached to the exclusion of any claim of the company and related back to the date of his settlement. Nelson vs. N. P. Ry. Co., 188 U. S., 108.

ARGUMENT 10 TO 32 INCLUSIVE.

TABLE OF CASES CITED.

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vs.

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I.

PETITION FOR REHEARING.

The said Alra G. Farrell comes now and respectfully petitions this Honorable Court for a rehearing of said cause for the following reasons:

1. Because of the great importance and far-reaching effect of the decision of the questions involved, it being the first construction by this court of the act of August 18, 1894, by which Congress intended to make good its solemn compact made between the United States and the great States of Washington, Idaho, Montana, North Dakota, South Dakota, Wyoming and Utah, when they entered the family of States, by liberal grants of the public lands, aggregating many millions of acres, for

school, university and other purposes, by enabling the governors of these States to have any of the unsurveyed public lands in their States reserved from all adverse appropriation from the date of filing application in the office of the Commissioner of the General Land Office for their survey, until the expiration of sixty days from the date of the filing of plats in the proper local land office within which period such States was specifically given the "*exclusive*" right to select in fulfillment of their grants such of the land as they might wish, the remainder becoming at that date a part of the "public lands."

2. Because this construction of the legal effect of the word "reserved," in the Act, as part of the wise and just intention of Congress, so clearly expressed, to carry out this compact in good faith, constituting, as we believe, the unauthorized right of the Commissioner of the General Land Office under his general powers derived from his control over the disposition of the public lands, and clearly contrary to the undoubted and undisputed purpose of Congress in enacting this statute, to "refuse to consider" and "reject" the State's application thus authorized, overruling a long unbroken line of construction of the Act by the Interior Department, over a period of thirteen years, resulting as it does in giving the land involved to the Northern Pacific Railway Company, under the Act of March 3, 1899, known as the Mt. Rainier grant, against a settler in good faith under the homestead law with a residence of more than twelve years.

3. Because this Court is without any decision of the Circuit Court of Appeals in this case on the construction of the Act of 1894, that court having rested its opinion and decision against the appellants upon the sole ground that the description by which the railway company select-

ed the land, subsequent to the State's application, in terms of future survey, situated as it is 7½ miles from any surveyed line was not of that reasonable certainty required by the terms of the grant.

4. Because the decision of the District Court which is affirmed conceded the Act was thought to be "more readily susceptible to the construction adopted in the first decision (a statutory reservation), but in practical administration such a meaning gave rise to the most serious difficulties," because, in his view, Congress did not intend to permit the tying up and prevention of settlement of vast areas of the public lands by authorizing the Governors of these States, by their applications for survey to do so, but *did intend* that the Commissioner of the General Land Office with no right given him by the Act to do so, should censor these applications, or exercise his arbitrary unauthorized right to *reject* them entirely and thus defeat the plain terms of the statute, enacted in accordance not only with this solemn compact but with its general public policy.

5. Because of the vital errors of the decision of the District Court, affirmed and repeated by this court, that the Commissioner "rejected" the State's application for survey embracing this township, which, because of failure of the State to appeal therefrom became final and conclusive against the State's application; as well as the further statement that no "selection" of the land involved was made by the State under the survey thus authorized, when the deposition of the Commissioner and the certified copies of the proceedings by the Commissioner, made part thereof, in the transcript, show beyond any reasonable doubt that the Commissioner "did not reject," nor refuse to "*recognize*" the State's applica-

tion, but on the contrary, proves it was duly received, considered, withdrawal made under it, the land duly and timely selected by the State in 1909, which remained resisting all attacks of the railway company and of Delaney, the settler, until canceled June 28, 1915. Tr., pages 81-94, both inclusive, and page 118.

6. Because, construing the option accepted under Act of March 3, 1899, under which the railway selection was made—requiring strict construction—which prohibited it from selecting any unsurveyed lands except such non-mineral lands as were so classified by the surveyor at the time of survey, "not reserved and to which no adverse right or *"claim had attached or been initialed"*; the Act of August 18, 1894, giving the State the "Exclusive" right for 60 days after filing of plat of survey in the local office, where application therefor was filed with the Commissioner of the General Land Office and notice given within 30 days, to select *every acre of land subject to its grant*, within the township, if it so desired; and the Act of May 8, 1880, which gave to Delaney a vested statutory right to enter the land settled upon within the same 60 days, which the Land Department is without power to prevent, and *the record shows there never was a moment from the time said railway selection was attempted to be made, when the land was legally subject to such selection; the State claim and that of Delaney absolutely taking the land out of the category of lands subject to its grant.* It follows that the cancellation of Delaney's application and the allowance of that of the company and patenting the land to it was illegal and wrongful. See Opinion of Attorney General Wickersham, 39 L. D., 482, dated January 30, 1911, and Decision District Court, bottom p. 143 of Transcript.

II.

That there may be no mistake about this, we here set out what the Commissioner testified was the whole of the proceedings by the Commissioner upon the State's application, as follows:

OFFICE U. S. SURVEYOR GENERAL,
DISTRICT OF IDAHO.
Boise City, July 10, 1901.

Honorable Commissioner of the General Land Office,
Washington, D. C.

Sir:

I have the honor to submit herewith an application of the Governor of the State of Idaho for the survey of the following townships:

Township 43 N., R. 4 E. * * * (And other land, describing eighteen in all).

* * * * * *

Based upon the Governor's application, I recommend the survey of the townships stated, with the exception of the three included or to be included in awarded contracts, but it is not deemed advisable to proceed with advertising for bids until after the demands of settlers can be more accurately determined.

Very respectfully,
JOSEPH PERRAULT,
U. S. Surveyor General for Idaho.

(Endorsed as follows) U. S. General Land Office.
Received July 15, 1901.

The U. S. Surveyor General,
Boise City, Idaho.

Sir:

I am in receipt of your letter of July 10, 1901, enclosing the application of the Governor of Idaho, dated July 5, 1901, for the survey of 17 full townships and one fractional township, designated as follows:

Tps. 43, N. R. 4 E. (And other townships).

* * * * * *

In reply you are requested to secure from the Governor, or the proper officer, a statement showing the *total area* of lands selected to date; also the approximate area of *all* of the townships heretofore applied for by the Governor; also to report whether or not *the total area* to which the State is entitled under the enabling act has not, or may be selected from the lands embraced in the townships heretofore applied for, the total number of which (approximately) is 206.

Pending the receipt of the report of the Governor no action will be taken in the matter of withdrawing from further disposal the lands in the 18 designated townships named in the Governor's application of July 5, 1901.

In the opinion of this office the areas embraced in the townships designated in the applications for survey heretofore made by the Governor from April, 1895, to July 1, 1901, are deemed sufficient to enable the State officers to make the requisite selections *in full*, and that the public interests will *not* be subserved by further withdrawals of lands from settlement, pending the settlement of the State's rights under the Act of Congress approved July 3, 1890, admitting Idaho into the Union, and subsequent acts.

Very respectfully,

BINGER HERMANN,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
23464-1902 Washington, D. C., February 10, 1902.

SUBJECT:

APPLICATION BY THE GOVERNOR FOR PUBLIC SURVEYS IN IDAHO.

Hon. F. W. Hunt, Governor,
Executive Office,
Boise, Idaho.

Sir:

I am in receipt, through Hon. H. Heitfeldt, U. S. Senate, of your letter of January 25, 1902, relative

to your application under date of July 5, 1901, for the survey of designated townships in Idaho, under the provisions of the Act of Congress approved August 18, 1894 (28 Stats. 394); also calling attention to your letter of August 16, 1901, submitting report as to the status of the lands previously applied for by the State, as requested per office letter "E" of July 19, 1901.

In reply I have the honor to inform you that your letter of August 16, 1901, as also subsequent applications for survey, were duly received, and the delay in acting thereon was due to inability to definitely determine the status of the apportionment made to Idaho of the annual appropriation for surveys and resurveys of the public lands for the ensuing fiscal year.

To the end of enabling this office to increase the apportionment to Idaho of the annual appropriation for public surveys for the fiscal year 1902-1903, so as to provide for the cost of survey under said act of August 18, 1894, *supra*, I have recommended to the Department, and there has been inserted in the estimates for the surveys and resurveys of public lands for the fiscal year 1902-1903 an additional amount of $25,000.

In the event of said additional amount being appropriated I will take pleasure in considering your application now pending for additional surveys.

Very respectfully,

BINGER HERMANN,
Commissioner.

III.

Decision of This Court.

In the decision of this court after a statement of the issues involved and the overruling of the decision of the Circuit Court of Appeals and the holding that the description of unsurveyed lands in terms of future survey is a designation of reasonable certainty even when located

7½ miles from any surveyed line, over rough, heavily timbered land, referring to the second point it is said:

> "As the district designated by Idaho for survey contained very much more land than the State was entitled to select, the Land Department refused to consider the application. No appeal was taken. Upon an analysis of pertinent statutes, opinions of the Land Department and of this court, the District Court held that the mere filing of application for survey did not so far withdraw the land from the public domain as to make the railway's selection wholly ineffective; and further, that if valid for any purpose, the application merely gave an option to select, never exercised in respect of the land now in dispute. We agree with the conclusion reached; and in view of the careful supporting opinion further discussion seems unnecessary.
>
> The decree of the Circuit Court of Appeals must be reversed and the decree of the District Court affirmed."

It will be observed that while this opinion states only that the Land Department refused to "consider" the application, the District Court not only held that it was not considered or that the Commissioner refused to recognize it, but held also that it was "rejected" by him, which we take it by your affirmance of this "careful supporting opinion" is also approved.

These terms "rejected" or "refused to consider" or to "recognize" an application, specifically provided for by statute, complying in all respects with its terms, or any other claim for that matter, have a well understood meaning in the Land Office practice as requiring some affirmative action equivalent to a decision or judgment. And under the Rules of Practice such action to be appealable to the Secretary must be a *final decision.*

To constitute a rejection of the State's application made under and in accordance with statutory authority, certain legal steps must have been taken. They are:

1. There must have been affirmative action rejecting the application, equivalent as we have stated, to a judgment.
2. To be appealable, there must have been a final rejection, such as is usually required in the courts, the Rules of Practice following them.
3. There must have been legal notice to the State of such action, with its right of appeal. (Charles B. McManus, 7 L. D., 42.)

If either of these legal steps are lacking, there can be no legitimate conclusion that the State was estopped by its failure to appeal. *The record shows conclusively that not a single one of these legal steps were taken by the Commissioner.*

There was no action which can be by any possibility construed to be a rejection of the application. It was also distinctly stated by the Commissioner that the action taken, which is claimed to have been a rejection, was *not final*, and there is no pretense there was notice of any action ever given to the State, which alone makes the holding that the State was concluded by its failure to appeal from action of which it never had any notice, clearly error of law, as "the time for appeal could not commence to run until notice had been duly given." Charles B. McManus *supra* and Red River Nat. Bk. vs. Craig (181, U. S., 558).

Waiving for the present the question of the right of the Commissioner under his general powers alone to have taken such action, it is perfectly clear while impressed with the idea that he had this arbitrary power if the facts

which he did not have and for which he wrote the Surveyor General to call upon the Governor or other proper officer to furnish him, sustained his then view, he would refuse to *withdraw* the land, *an entirely different proposition*, and as held by the Department could not have affected the State's rights.

The record shows, however, that he was convinced by the Governor's report that he was mistaken, and not only did not attempt to exercise this power, but apologized in his letter to the Governor, and his *only* letter to him, written February 10, 1902, seven months after the letter to the Surveyor General, acknowledging the receipt of the report from the Governor, explaining to him the delay, as he stated, was caused by his being unable to determine what amount of the appropriation for surveys could be applied to Idaho, and that he was seeking to get an additional appropriation of $25,000, which, if he succeeded in doing, he would "take *pleasure in considering* your application *now pending* for additional survey." (Italics are ours.)

IV.

Argument.

Thus, the whole structure upon which the District Court built up its decision against the State's application falls to the ground when the acid test of the acts of the Commissioner are set forth, as they occurred, and as shown by the deposition of the Commissioner in the record.

WILL THIS COURT, THEN, NOTWITHSTANDING ITS HEAVY DUTIES TAKE ONE HALF HOUR AND EXAMINE THE PAGES OF THE RECORD HEREINBEFORE REFERRED TO AND BE CONVINCED BEYOND ANY REASONABLE DOUBT THAT ITS DECISION IS BASED UPON AN ERRONEOUS STATEMENT OF THE LEGAL ACTS IMPUTED BY

THE DECISION OF THE DISTRICT COURT AND AFFIRMED BY THIS COURT AS TO ANY AFFIRMATIVE ACTION OF THE COMMISSIONER CONSTITUTING THE LEGAL STEPS NECESSARY TO CONCLUDE THE STATE BY ESTOPPEL?

What we have stated as to the inaccuracy of the proposition that the Commissioner rejected the State's application, is still further and most satisfactorily supported by the first full consideration of the act involved and the action taken by the Commissioner upon the State's application for survey of this township made by Secretary Garfield, June 27, 1907 (35 L. D., 640), wherein all of the objections, which have been urged subsequently, were taken up and considered, the Department holding (syllabus):

> "The filing on behalf of the State of an application for the survey of lands under the Act of August 18, 1894, and the publication of notice thereof as provided by the Act, operate as a withdrawal thereof, and all settlements subsequently made are subject to a preference right of the State.
>
> Notice to the local officers of the withdrawal of lands embraced in an application of survey by the State, as provided by the Act of August 18, 1894, is intended primarily for their information, in order that proper notation may be made upon their records, and is *not essential* to the protection of the rights of the State." (Italics ours.)

After stating that notice *was* given by the Commissioner as required by the statute, it is further said:

> "An inquiry was, however, instituted with regard to the withdrawals theretofore made under the statute, the purpose being to determine whether sufficient withdrawal had not already been made on account of previous applications to satisfy the sev-

eral grants to the State, and to determine, as a consequence, the necessity for further reservations by the State's application for a survey. As before stated, the authority to institute this inquiry is now disputed. *But this need be given no further consideration at this time because response was made on behalf of the State, which was evidently considered entirely satisfactory from the fact that many other applications have since been filed, respected, and notice of withdrawals issued thereon by your (Commissioner's) office.*"

If the State had fully performed the conditions upon which a reservation was directed by the statute, the mere failure on the part of your office to give proper notice to the local officers or the miscarriage of such a notice, in the event that it was directed by your office, should not prejudice the rights of the State. * * *

Upon the whole, therefore, it must be held that the State had shown itself entitled to claim the preferential right of selection for a period of sixty days from the date of the filing of the plat of the survey of this township in the District Land Office, as granted by the Act of 1894." (Italics ours.)

In the light of this thorough, full and entirely satisfactory Departmental decision, rendered June 27, 1907, more than six years after the action of the Commissioner which is claimed to have been a rejection by him of the State's application, how can it be insisted that the application was "*rejected*" July 19, 1901, and in the absence of appeal by the State it *became final?*

But this is not all. As set out by the Commissioner in his review of the action taken on the application (Tr., p. 93), substantially the same holding was made in the case of Williams vs. the State, July 17, 1907 (36 L. D., 20), and motions for review of these decisions, dated June 4,

1908 (36 L. D., 479-481), wherein they were all affirmed by First Assistant Secretary Pierce, and the selections of the company were ordered cancelled.

Again, in Idaho vs. N. P. Ry. Co. (37 L. D., 68), July 24, 1908, Secretary Pierce held:

> "The land in question is a portion of that of the survey of which the State filed its application July 8, 1901, under the provision of the Act of August 18, 1894, and the contention of the several appellants that no preferred right of selection accrued to the State by virtue thereof has already been decided by the Department favorable to the claim of the State (Thorpe et al. vs. State of Idaho, 35 L. D., 640), and as none of the matters urged in opposition thereto appear to warrant any modification or reversal thereof, *this question will not now be reopened or further considered.* (Italics are ours.)

With such confirmation of our assertion that the State's application was not rejected, upon what possible ground can it still be held the State was concluded by failing to appeal from such claimed rejection?

For some unaccountable reason the railway company's selection was still maintained, and its cancellation which was ordered by the Department, while the Commissioner had no power to do other than carry out the Departmental decision (see case John Woods, 10 L. D., 230), it was neglected, and all of these questions again came before the Department on March 20, 1911 (39 L. D., 583), when Assistant Secretary Pierce in a most elaborate decision held (syllabus):

> "Selections by the Northern Pacific Railway Company under the Act of March 3, 1899, proffered subsequent to the application of the State for survey of

> lands under the Act of August 18, 1894, and while the lands were reserved from appropriations adverse to the State, *are not*, upon rejection of the subsequent application by the State entitled to recognition as of the *date of presentation, to the prejudice of the rights of settlers.*" (Italics are ours.)

This decision also again disposed of the claim that the State secured no preference right under her application for the reason that the application embraced an area largely in excess of the grant on account of which it was made, citing Thorpe vs. State on review (36 L. D., 479), which held the State was not limited to an area sufficient to satisfy its grant, in which case the reasons for such holding were stated at length; that a motion for review was filed by the company urging this and other reasons why the State gained no preference right by this application, among them, that the Commissioner of the General Land Office had specifically refused to withdraw the lands upon the application of the State. In answer to this, it was said, considering the contention and in denying the motion, the Department in a decision of October 25, 1908:

> "A sufficient answer to this contention is that for the purposes of this case it is immaterial that the Commissioner of the General Land Office refused to withdraw these lands. By the terms of the Act of August 18, 1894, *supra*, under which the application for survey was made the withdrawal became effective and was an accomplished fact upon the perfection of the application, and while it remained for the Commissioner of the General Land Office to give notice of the withdrawal, the failure of that officer to do so did not defeat it. *The withdrawal was statutory and in no wise dependent on the discretion of the Commissioner of the General Land Office.* (Thorpe

vs. State, 39 L. D., 640.) This being true, and the lands being withdrawn for a special purpose, *they were not subject to selection by the railway company*, and this is true without regard to the question whether the State had previously apparently selected an excess of land to satisfy its grants.

Upon the promulgation of this decision, the railway company, through its resident attorneys, requested that before the company's lists of selections were cancelled an examination of the conditions of the grant to the State for university purposes be made. But your office, on November 7, 1908, considering said Departmental decision of October 25, 1908, on review, as determinative of the company's claim to the land in question denied the request. A similar request was again denied by your office November 19, 1908, and on that day Departmental decisions, on review, were promulgated and the company's selection directed to be cancelled as to the lands in question." (Italics are ours.)

The Department in a decision in 39 L. D., 583, said:

"But the question of irregularity in the State's application is another matter, and is now raised for the first time. The facts as they appear from the findings of your office and from an inspection of the original files and records thereof, are as follows: Under date of July 5, 1901, F. W. Hunt, Governor of Idaho, addressed a communication to the United States Surveyor General for Idaho and the Honorable Commissioner of the General Land Office, for the survey under the provisions of the Act of 1894, of certain townships therein named, among others townships 44 north, range 3 east, with a view to the satisfaction of its public land grants. This application bears evidence of having been received * * * in the General Land Office July 15, 1901. The notice

of this application for survey bears date July 6, 1901, and the duly certified sworn statement by the publisher of the weekly newspaper at Wallace, Idaho, shows that such notice was published for the full period of six weeks."

He then proceeds to show that the publication was sufficient, and that at the date the railway lists were filed the land was reserved from appropriation adverse to the State. No legal rights could, therefore, have attached under such filing. It is further said:

"The State afterwards selected the land and thereafter the question of its right thereto was one between it and the government, and that question was not complicated by the filing of intervening adverse claims, even though same were filed pursuant to and received in accordance with subsisting administrative policy. The contention made involves the consequence that in instances where, after the State's application for the survey of the township, under Act of 1894, shall have been defeated by placing the lands in a National Forest, still the railway claim would not be defeated by the creation of such national forest, and, therefore, by indirection, the superior claim of the State would be defeated by the inferior one of the Company. *Such a consequence would be wholly unfair, was not contemplated, and cannot be tolerated.* (Italics are ours.)

It is then held that settlements made in good faith prior to July 31, 1905, would be accorded priority, and upon the allowance of entry for land so settled upon, the company's selections will, to that extent, stand rejected.

It is obvious, therefore, that both the Department in its decision of March 10, 1914 (43 L. D., 168), and the District Court, were mistaken in the statements made therein

that the Commissioner rejected the application of the State when made, and that in the absence of appeal, it became final and thus closed out all the rights which could have been acquired had this not been done. It is simply impossible in view of the subsequent proceedings by the Commissioner and the Secretary as set out in these decisions, covering from 1901, when the application was presented, to 1914, a period of 13 years, without a single break, to maintain that position. It is also shown that all of the questions which have ever been raised, either in the Department, the District Court, or this court, were raised and fully considered by these decisions and the claim of the State as against the railway company's selection, fully sustained and the company's selections ordered canceled, again and again. (See 7 L. D., 42, and Leet vs. N. P. Ry. Co., 37 L. D., 37.)

V.

The Commissioner Without Any Power to Reject State's Application.

In view of what has gone before, it is hardly necessary to discuss this question, for the reason that he made no attempt to reject it in this case. That the reservation provided for in the Act of 1894 upon the filing by the State of application for survey, and it may be giving the notice required of him, creates a statutory withdrawal or reservation is in effect conceded by the District Court in its decision. It is so held by all of the Departmental decisions except the one in 1914 (43 L. D., 168).

This court has also held that the statute prohibiting further proceedings by the Land Department in cases where no contest or protest was filed within two years after the issuing of final certificate, is statutory and beyond the reach of the Land Department. It is also held

by this court that in selections by railway companies and others authorized to make them, where the land is subject thereto and everything that the statute requires has been done, such a vested right is created that title cannot be denied. The court is familiar with the decisions, and especially the recent ones on this question, and we need not refer to them here.

But, the learned District Court after admitting that the language of the Act of 1894 was thought to be more readily susceptible to that construction, adopted by the Department, holds it cannot be sustained because in practical administration such a meaning would give rise to the most serious difficulties. He then proceeds to point out the only one upon which he relies, which is one that had been considered by the Department from the beginning, and many times held to be without force, viz., the great danger that the States would withdraw vast tracts of public lands, largely in excess of their needs, and thus prevent the settlement of the public lands, which could not have been contemplated by Congress in the enactment of the legislation. Is his reasoning logical? This view is based solely upon the theory that Congress, if it had known what it was saying, would not have entrusted the Governors of the States mentioned with this great power, but that the Commissioner of the General Land Office, without any authority under the Act and only because of his general powers, was intended by Congress to be clothed with such superior knowledge, patriotism and public spirit as to place a check upon the improvident governors of these States, who it will be generally conceded, were more largely interested in the settlement of the public lands in their States, than could be the Commissioner.

The records of the Land Department, the history of the execution and administration of this statute from its date to 1914, a period of 13 years, proves beyond any kind of doubt that this theory of the District Court is purely imaginary. This is demonstrated by the fact that these records (which the court has a right to consider, 152 U. S., 211; 138 U. S., 573), show that the Commissioner in no *single instance*, in this case, *or any other*, ever attempted to reject, refuse to recognize or consider any application made by any one of the governors in the seven States involved. Will it be contended that notwithstanding such administration for 13 years, during which it is probably true that these States succeeded in obtaining a large per cent of the lands to which they are entitled, such an administration of the Act involved the deplorable consequences pictured by the learned District Court in his decision? We apprehend no one will make such claim. It follows that there is absolutely nothing whatever in this objection, but on the contrary, it is exactly what was intended by Congress, as demonstrated by the Act of 1894 following that of 1893, which latter Act made a blanket withdrawal from the date of the filing of plat of survey in the local office, for the benefit of the State, of *all lands surveyed* without any action whatever by the State. But one year's practical operation convinced Congress that this was not a sufficient protection to the States in the filling of their grants for the reason that in many cases the most valuable public lands were settled upon, or selected by the railway companies and others before the plats of survey were filed, thus depriving the States of the valuable aid intended. What then could have been the purpose of the Act of 1894, except to prevent this by making an absolute, statutory reservation of all lands to

be embraced in an application for survey from the date it was *filed with the Commissioner*, whether he withdrew the land or not? This question was submitted to the Department of Justice on two occasions, and in the last opinion, by Attorney General Wickersham, January 30, 1911, set out in 39 L. D., 482, it was said:

> "It is the preferential right of selection arising with the application which alone lends color to the effort to characterize it as a filing. (This involved the question whether the application prevented the taking of the land for a forest reserve.) But that is essentially a right to forestall new claims of others until the sections shall have been identified and the State shall have had its opportunity to examine them, satisfy itself in regard to their value, and applicability to its grants, and thereupon make such selections as it may deem advisable. It does not carry with it any obligation to make any selection, nor any presumption that any of the sections when ascertained would prove to be free from prior claims, or of the character of land, which the State is authorized to select. Some or all of the lands may turn out to be mineral lands. Some or all may have been previously settled upon or otherwise appropriated. *Yet the application for survey will have covered all of them*—those which lie beyond the reach of the State as well as those which when identified it may lawfully acquire if it choose to do so. * * * It is not of course to be assumed that the States would deliberately abuse such a power."

The same view was, perhaps more fully expressed by Acting Secretary Ryan in Kay vs. State of Montana, September 27, 1905 (34 L. D., 139), as follows:

> "Under the Act of 1893 the State is given a preference right for 60 days after the filing of the town-

ship plat of survey within which to make its selections as against all except settlers. The practical operations under the Act undoubtedly disclosed that prior to and pending the survey in the field, many of the best tracts were settled upon and so were lost to the State, and it was obliged to take the inferior lands, thence the Act of 1894 was passed, to enable the State to ask for the survey and have the lands *reserved from settlement from the date of application*, thus giving the State an *enlarged opportunity* to secure the selection of lands under its grants, and that was *the undoubted purpose* Congress had in view in passing it. If it be held that said Act abrogated and repealed the Act of 1893, then the State has no preference right of 60 days after the filing of the plat of survey within which to make its selections, in any township wherein it has not applied for the survey, published timely notice thereof and secured the withdrawal of the land from settlement or other adverse appropriation." (Italics are ours.) See McFarland vs. Idaho, 32 L. D., 107.

The Secretary then holds the Act of 1894 did not repeal the Act of 1893, under which the State still had and has a preference right for 60 days to select any lands which may have been surveyed without taking any steps therefor.

It would seem to follow from these opinions and decisions as well as the uniform practice of the Department from the date of the Act of 1894 until March 10, 1914, that Congress *did* intend to do exactly what the plain, unambiguous, clearly stated language provided in carrying out its compact with the States, and obviously, the opinion of the District Court to the contrary notwithstanding, did *not* intend that the Commissioner, or any other official, should prevent the States mentioned from obtaining what it had solemnly promised. Under any circumstances

the courts hesitate to hold Congress did not intend to do what its plain language imports, and in a case like this where it is so clearly in harmony with its general policy and its solemn promise, and no bad results can be shown in its 13 years so construed, we can hardly see any reasonable ground for sustaining this view, and must most respectfully, but earnestly, request the court, especially as this is the first construction of this feature of the Act of 1894, which has been decided by this court; that, too, without the aid of the views of the Circuit Court of Appeals upon it, to reexamine and reconsider it. *Ex parte* Jordan (94 U. S., 4 Otto, 248, and Daniels vs. Wagner, 237 U. S., 547; and Rogers vs. U. S., 185 U. S., 86).

VI.

One other point in the decision of the District Court is worthy of attention, and that is that—"Later, in January, 1905, it seems that as a result of certain supplementary proceedings, the General Land Office recognized the preference right of the State and withdrew the lands, but only from January 20, 1905." Turning now to pages 130-132 of the Transcript, we find the Commissioner under said date of January 20, 1905, pointing out these "supplemental proceedings," which consisted *only* of the State's deposit December 20, 1904, of $20,000 under the Act of 1894, accompanied by a copy of the notice for survey dated July 6, 1901. As to the publication of notice, the decision of the District Court admits that it was timely made, so that this feature of it is of no importance, leaving only this claimed "supplemental proceedings," as the deposit by the State, as authorized by the Act, of money for making the survey, and in accordance with the Commissioner's letter of February 10, 1902, to the Governor, as being the cause of delay in acting upon his application.

With due deference to the learned District Court, we must say that having held the Commissioner rejected the application of the State in 1901, which, for lack of appeal, became final and operated as an estopped of the State, it found itself in a difficult position to account for the withdrawal by the Commissioner more than four years thereafter of land under this rejected and closed out application of the State. We hardly think he was happy in getting this dead application which had slept for four years into such activity as to induce the man who had rejected it to resurrect and carry out its provisions. But it was done, and we can now only invite attention to it.

VII.

What shall we say as to the assertion by the decision of this court that the option to select in this case was "never exercised in respect to the land now in dispute"? Turning to page 88 of the Transcript, containing a part of the deposition of the Commissioner and reciting the proceedings upon this application, that of the railway company and of Delaney and other settlers, it is said:

> "The records of this office show the following selections and homestead applications in conflict with the company's selections first herein described: State Indemnity School List 02604, covering all of Section 20, filed July 30, 1909, and approved August 19, 1909. * * * The township here involved is also noted on the tract book as withdrawn under the Act of August 18, 1894 (28 Stat., 394), by letter E January 20, 1905, said withdrawal being based upon the Governor's application dated July 5, 1901."

Turning now again to page 113 of the Transcript, we find that under date of June 28, 1915, the Commissioner of the General Land Office canceled this State's list 02604 covering the land involved.

How then can the statement of the fact that no selec-

tion was ever made of this tract by the State be reconciled with the proceedings in the Land Office and the Department, at least from 1905, admittedly by the District Court, until 1915, a period of 10 years, during which it was constantly under attack by both the railroad company and Delaney, and perhaps other settlers? The District Court seems to have had trouble in getting the closed-out application of the State so far restored as to have withdrawal made under it, but the contention that no selection was ever made requires the opposite, viz., the getting rid of or ignoring a live active selection, approved by the local officers, considered may times by the Department and finally canceled, about which there is no question of doubt, in 1915.

VIII.

We come now to the consideration of the decision of the Department in the case of Thorpe vs. Idaho, dated March 10, 1914, and reported in (43 L. D., 168) as sustaining the contention that the Commissioner rejected the State's application and in the absence of appeal, this rejection became final, and also that under the decision of the Supreme Court of Idaho, the selecting officers were without power to make the selections, upon which the Department proceeds to hold no selection was made, notwithstanding the confirmatory statute of 1911, retroactive on its face, confirming the Acts of the Land Board which made the selection, holding it could not be made retroactive so as to confirm the selections which the Supreme Court had held were void for lack of power in the Board to make them, but holding that it "*had no retroactive effect and in no wise impaired the rights of bona fide settlers on the lands whose claims had attached long before.*" Whatever may be the effect of this decision its purpose is clearly shown to have been to protect settlers who had made settlement prior to its date, viz., 1911.

But, we apprehend no one will insist the company acquired such a right by filing its application subsequent to that of the State as to prevent the legislature from ratifying the selection made by the board, made retroactive on its face. This results from two well settled propositions. First, that there is no statute authorizing its selection, and it is sustained only because of a vicious practice in the Land Department in contest cases, of permitting a second application to contest, depending entirely upon the success of the first contest and his making entry within 30 days after he secures the cancellation of the entry and makes entry as provided. Second, during this time it has never been held the second applicant acquired any right whatever in the land, and if the analogy to a contest is sound, then the company could acquire no right whatever prior to the survey and the 60 days after filing of plat given the State to make selection. But the Department in this decision disregarding and failing to refer to its decision in the case of Thorpe vs. Idaho, made March 22, 1913 (42 L. D., 15), considering the decision of the Supreme Court of Idaho and this confirmatory statute of 1911, which held:

> "*This Department has never had any doubt as to the validity of these selections.* Its concern was because of the seeming declaration of invalidity pronounced by the court. The Department did not feel warranted in patenting lands to the State of Idaho in exchange for lands which the court of highest resort in that State had apparently declared could not be relinquished by the State Land Board. This difficulty has now been removed, and it is not material whether the court changed its mind upon the question or whether the invalidity suggested by the court in the first instance has been cured by legislation. In

either case no good reason remains why said Departmental decisions should not be carried into effect. *They are therefore hereby reaffirmed and the necessary steps will be taken to carry them into effect.* In the adjustment of the State's grant, however, under those decisions, due regard will be had for the State's wishes in the matter of the protection of such equitable claims as may be, or have been, preferred by settlers who were misled by the failure of the Commissioner of the General Land Office to cause to be noted said withdrawals of the records of the General Land Office." (Italics are ours.)

In the decision in 43 L. D., *supra*, as before stated, this decision is ignored entirely, and it is based upon the statement that the selection was void as held by the Supreme Court, and evidently applying the doctrine that the railway company had a vested right, without so stating, held the State's selections were void, and although holding that settlers were protected by the confirmatory statute, this decision was used as authority for the cancellation of the State's selection followed by that of the Delaney application, and the allowance of the railway company's selection and patenting the land to it.

It seems to us the decision by Assistant Secretary Laylan in 42 L. D., *supra*, stated a sound legal proposition, to the effect that the Department was not bound by the decision of the Supreme Court of Idaho in the enforcement of the United States statute; that it was immaterial what it decided, for the reason that the Department never had any doubt of the validity of these selections, fully sustaining them, but suggesting the equities of the settlers on the land. The decision in 43 L. D. seems to go upon the principle that although the proper land officials of the State, viz., the Land Board, made

the selections in due form, because the Supreme Court of Idaho in a case decided by it, held this Board had no authority under the constitution or laws of Idaho, to relinquish the 16th and 36th sections granted to it and select other land in lieu thereof, it was void. This was followed, as before stated, by a confirmatory statute passed in 1911.

But there is another principle sustained by the decisions of the Department and the courts that would prevent the attaching of any right by the railway company to the land while the State's selection was of record whether erroneously allowed, or otherwise. In other words, it did not have to be a valid or legal selection to prevent any other appropriation of the land, particularly after it was accepted and approved by the local officers and consistently sustained prior to the decision in 43 L. D., *supra*.

In the case of Santa Fe Pac. R. R. Co. vs. California, 34 L. D., 12, Secretary Hitchcock held as follows:

> "The selections were accepted by the local officers, duly entered of record, and were pending undisposed of at the time of the proffer of the selection of the railroad company, and it was because of the pendency of such selection, *and without regard to their validity*, that your office and the local officers held that the land covered thereby was not subject to selection under the Act of June 4, 1897.
>
> This action is affirmed. Good administration requires that, pending the disposition of a selection, even though erroneously received, no other application could be accepted, nor should any rights be considered as initiated by the tender of any such application."

"It is not the validity of any claim, but the fact that such claim was made, that excludes the land from the category of public lands within the meaning of the Act in suit granting the right to select public lands." S. P. Ry. Co. vs. Brown, 75 Fed., 90; McIntyre vs. Roeschlaub, 37 Fed., 556.

It has also been held by this court that:

"If the lands were excepted from the land which the company was authorized to select as lieu lands at the time of the attempted selection, subsequent abandonment by the State restored the lands to the public domain, but no rights passed to the railroad company." Kansas Pac. Ry. Co vs. Dummeyer, 113 U. S., 629; Hastings and Dakota R. Co. vs. Whitney, 132 U. S., 357, and St. Paul M. & M. Ry. Co. vs. Donahue, 210 U. S., 35.

See also decision of District Court, bottom p. 143 of Transcript.

It will be conceded that the State has the right under the Act of August 18, 1894, to select any and every acre of land falling within the terms of its grant upon its compliance with the act in making application for survey of any township, which may fall within its boundaries, for 60 days after filing of plat of survey, in the local office, *to the "exclusion"* of all persons or corporations. How, then, can it be held its compliance with the law in its application "is not the initiation" as well as the "attaching" of a claim so as to prohibit the railway company from selecting it under its grant. And after cancellation the rights of Delaney must be preferred to any claim which the railway company could have had. In the case of N. P. Ry Co. vs. Idaho, 39 L. D., 583, at page 590, it is held:

"It has never been held by this Department in a case where the State made its selections under the Act of 1894, and in attempting exercise of its preference rights, that upon the rejection of such selections intervening adverse claims for the same lands would be recognized as of the date proffered. Specifically, it has surely never been held that the proffered selections of a railway company, under *any law*, for lands covered by valid application for survey under the Act of 1894, *secured any legal rights whatever.*" (Italics ours.)

In the case of Moore vs. N. P. Ry. Co. (43 L. D., 173), First Assistant Secretary Jones held (syllabus):

"Any question concerning the formality of the assertion and completion of title under settlement claims (under Act of 1880) is a matter between the United States and the settler; and the Land Department is not deprived of its jurisdiction and duty to give equitable consideration to asserted settlement claims by the tender of a scrip application for the land by one having no claim to equitable consideration."

Again, in the case of Wilson vs. New Mexico, First Assistant Secretary Vogelsang (45 L. D., 582), considering settlements under the Act of May 14, 1880, and the failure of a settler to file within time, held:

"In the administration of the public land system, it is a fundamental principle that the settler shall be preferred over claimants who seek to assert scrip or other rights to the public domain, and in pursuance of this principle the Department will give equitable consideration to asserted settlement claim, in the presence of a scrip application for the land by one without claim to equitable consideration."

To the same effect is the decision of this court in the case of N. P. Ry. Co. vs. Amacker, 175 U. S., 564, to which reference is here made.

When the State's selection was canceled under the decision of 43 L. D., *supra*, Delaney was a resident on the land and had been so residing for 12 years, having made his settlement in 1903, during the pendency of the State's application, and the District Court found his compliance was sufficient and that he had made application for entry within the time allowed therefor under the Act of 1880, providing for the initiation of homestead claims by settlement. Now, the only way the Department could decide against his claim was to hold that it was ruled by the decision in 43 L. D., to the effect that the selection of the State was void and the confirmatory statute could not be made retroactive, against the railway company, but ignoring the statement contained in the decision that it could not be made retroactive so as to "impair the rights of *bona fide* settlers whose settlements were made long before." It is thus seen that the Department held exactly the contrary doctrine when it canceled Delaney's entry, holding it was ruled by that case, and sustained the selection of the railway company, which could acquire no right whatever, as we have seen, whether the selection was valid and legal or not, so long as it had been accepted by the Department and remained of record. It also ignored previous decisions of the Department which held the State's rights attached in 1905, and that all settlers prior to that date acquired a superior right to that of the State. It strikes us that this is clearly error.

IX.

Touching the question of the sufficiency of the description of the land in the selection of the railway company of an unsurveyed tract 7½ miles from the nearest sur-

veyed line, the land between being "very rough and mountainous, most of it covered with heavy timber" (Tr., p. 67), wherein this court overruled the decision of the Circuit Court of Appeals, based, as it claimed, upon its reasoning in the case of West vs. Rutledge Timber Co. & N. P. Ry. Co., and the decision of this court affirming the same (244 U. S., 90), in which case the land was 3½ miles from the nearest surveyed line, less than half the distance; it would seem that for all practical purposes the presence or absence of any surveyed line is of little, if any, importance, for the reason that if in such rough heavily timbered country, as the evidence shows to be the case here, a tract designated by the description it will bear when surveyed, across one whole township of 36 sections, containing 640 acres each, and one-fourth the distance across another one, is of the reasonable certainty required by the Act of 1899, to enable intending settlers to locate it with reasonable accuracy, bearing in mind it is for this purpose alone the land is required to be designated with reasonable certainty. Or, is it so far removed from any line of survey that, as held by the Circuit Court of Appeals in the West case, *supra*, "it stands to reason that difficulty of setting foot on the identical tract, no reasonable being could expect another to tie back to a known survey for the purpose of identification." It has no importance so far as the railway company is concerned for it has no idea where it is located, but all it has to do is to claim the land which the surveyor marks as that selection, and after survey conform it, if necessary, while the poor settler must know whether he is on this land thus described or not. He is also required to mark his land and post it. We know of no argument with more force than a plain statement of the facts, and if the court wishes to settle this as the proper construc-

tion of the Act of 1899, this branch of the decision needs no further discussion. Unfortunately in neither the West case, or in this one, was any evidence given by surveyors, but it is wholly the impression of the court.

It only remains to be suggested that the State has no interest whatever in this case. Neither are we interested in any way in its behalf and it is of interest to Delaney, the settler, only to the extent that it prevented the attaching by the railway company's selection of any right to the land prior to his settlement in 1903, for, if we are right in our view, that the company could obtain no interest in the land between the filing of the application and the cancellation of its selection, it follows irresistibly that when the State's selection was canceled the rights of Delaney immediately attached to the land to the exclusion of any claim of the railway company, and that this being the case the bill should be sustained and the appellants required to hold as trustee for Delaney's successor, the present appellee.

And your petitioner prays, therefore, that an order may be made for a rehearing of the argument in this case, on a day to be appointed by this court and upon such points as the court may direct.

ALBA G. FARRELL,
By S. M. STOCKSLAGER,
Her Counsel.

I respectfully certify that I believe the grounds assigned for the foregoing petition for a rehearing are meritorious and well founded in law and fact as demonstrated by the Record.

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